

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
2002 Biennial Regulatory Review – Review of)	MB Docket No. 02-277
the Commission’s Broadcast Ownership Rules)	
and Other Rules Adopted Pursuant to)	
Section 202 of the Telecommunications Act)	
of 1996)	
)	
Cross-Ownership of Broadcast Stations and)	MM Docket No. 01-235
Newspapers)	
)	
Rules and Policies Concerning Multiple)	MM Docket No. 01-317
Ownership of Radio Broadcast Stations)	
in Local Markets)	
)	
Definition of Radio Markets)	MM Docket No. 00-244

COMMENTS OF THE DISPATCH BROADCAST GROUP

The Dispatch Broadcast Group (“Dispatch”) comments that the Commission’s rule prohibiting a newspaper publisher from owning a broadcast station in the same local market¹ (“Newspaper Rule”) should be repealed by the Commission because it contravenes the First Amendment and is detrimental to the public interest.

Dispatch owns and publishes *The Columbus Dispatch* newspaper, named the best metropolitan newspaper in Ohio by the Associated Press and the best daily newspaper in Ohio by the Cleveland Press Club. Consistent with the Commission’s order adopting the Newspaper Rule,² Dispatch also owns and operates WBNS-TV in Columbus, Ohio which Dispatch built and

¹ 47 C.F.R. 73.3555(d)(2001).

² *Amendment of Sections 73.34, 73.240, and 73.636 of the Commission’s Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, 50 FCC2d 1046 (1975); *Memorandum Opinion and Order on Reconsideration*, 53 FCC2d 589 (1975).

put on the air in 1949.³ Dispatch's affiliated company, RadiOhio, Inc. has been a leader in radio since 1929 and today operates two of the most popular Columbus stations, WBNS-AM, an all-sports station and WBNS-FM, an adult contemporary music station.⁴ Dispatch has been committed to quality in newsgathering since 1905 and continues to pursue outstanding journalistic and technical performance in all of its operations.

The following discussion demonstrates why the Newspaper Rule is inconsistent with the First Amendment, is no longer "necessary in the public interest,"⁵ and undermines the public interest. Dispatch's experience in Columbus illustrates the kind of superior service to the public that could prevail elsewhere in the country if the Newspaper Rule were repealed.

I. The Newspaper Rule contravenes the First Amendment to the Constitution.

The Newspaper Rule, by singling out newspapers as a category of First Amendment "speakers" not permitted to own broadcast stations where they publish newspapers,⁶ should be considered a "content-related" rule, subject, at a minimum, to intermediate scrutiny as articulated by the Supreme Court in *United States v. O'Brien*.⁷ The

³ WBNS-TV has won the National Edward R. Murrow for Continuing Coverage Award, two regional Edward R. Murrow awards, six Ohio Associated Press awards, and was named Station of the Year by the Ohio News Photographers Association. A leader in technology, Dispatch volunteered to construct its DTV facility in Columbus as one of the initial group of pioneer DTV stations. *See also* Remarks of Commissioner Susan Ness, MSTV Annual Update, Washington, D.C., Oct. 27, 1998.

⁴ Dispatch also is the licensee of WTHR-TV, and WTHR-DR Indianapolis, IN and an affiliated company is the licensee of WALV-LP, Indianapolis.

⁵ Telecommunications Act of 1996, § 202(h) ("Biennial Review Standard").

⁶ The Newspaper Rule also operates to ban broadcasters from publishing newspapers in their broadcast markets, a condition sharply at odds with the First Amendment.

⁷ *United States v. O'Brien*, 391 U.S. 367 (1968) ("*O'Brien*"), *reaff'd in Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997). Arguably, the Newspaper Rule should be reviewed under strict scrutiny because it is content-based and the scarcity doctrine no longer supports the less restrictive standard applied to broadcast licensees in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

O'Brien test states that a government action must “advance[] important interests unrelated to the suppression of free speech and . . . not burden substantially more speech than necessary to further those interests.”⁸ The Newspaper Rule does not advance a substantial government interest – in fact, it harms viewpoint diversity and the public – and it is overbroad, thus failing the *O'Brien* test on both counts.

Fundamentally, the Newspaper Rule does not promote viewpoint diversity, the rule’s stated goal.⁹ Chairman Powell observed that he failed “to see how ownership restrictions in themselves do much to promote the goal of antagonism. . . the ownership class may include different people, but it is hard to see how that ensures that they are different in their viewpoints.”¹⁰ Along the same lines, one of the studies commissioned by the Commission’s Media Ownership Working Group concluded that diversity of programming sources does not equate to diversity of programming.¹¹ By contrast, over 440 newspaper-broadcast combinations were grandfathered by the Commission in 1975, yet there is no pattern of cross-owned media eliminating voices or viewpoints from the marketplace. Another study determined that there is a “wealth of ‘diverse and antagonistic’ information in situations of newspaper/broadcasting cross-ownership.”¹²

⁸ *O'Brien* at 391 U.S. 377, 520 U.S. 189.

⁹ *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 786 (1978)(“*NCCB*”).

¹⁰ *1998 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 15 FCC Rcd 11058, 11149 (separate statement of Commissioner Powell) (“*1998 Biennial Review Order*”).

¹¹ Mara Einstein, Program Diversity and the Program Selection Process on Broadcast Network Television., September 2002. (FCC Media Ownership Working Group Research Paper #5)

¹² David Pritchard, *A Tale of Three Cities: “Diverse and Antagonistic” Information in Situations of Local Newspaper/Broadcast Cross-Ownership*, 54 Fed. Comm. L.J. 31, 49 (Dec. 2001).

The Newspaper Rule also fails the second prong of the *O'Brien* test by being overbroad. For example, the Fourth Circuit Court of Appeals faulted the Commission for failing to consider other “less drastic regulatory schemes that might achieve the substantial government interests” at stake¹³ and vacated the cross-ownership ban on common ownership of a local exchange telephone company in the same service area as a cable television company.¹⁴ Similarly, in *Time Warner Entertainment Co., v. FCC*,¹⁵ the court determined that the Commission had not shown the horizontal and vertical cable ownership rules¹⁶ did not burden substantially more speech than necessary.¹⁷ The blanket ban on local combinations of newspapers and broadcast stations is surely too broad to pass the *O'Brien* test, even if the Commission could muster evidence that such a ban promotes diversity of viewpoints.

II. The Newspaper Rule Fails Even the Rational Basis Test

Even under the least restrictive constitutional analysis, however, the Newspaper Rule fails. The “rational basis” test examines whether a rule is a “reasonable means of promoting the public interest in diversified mass communications.”¹⁸ The Supreme Court in *NCCB* said that the Newspaper Rule was “based on permissible public-interest goals and, *so long as the regulations are not an unreasonable means* for seeking to achieve these goals, they fall

¹³ *Chesapeake & Potomac Tel. Co.* 42 F.3d 181 (4th Cir. 1994), *cert. granted* 515 U.S. 1157 (1995), *vacated* 516 U.S. 415 (1996)(made moot by Telecommunications Act of 1996).

¹⁴ Cable Franchise Policy and Communications Act of 1984 § 533(b).

¹⁵ *Time Warner Entertainment Co., L.P. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001)(“*Time Warner II*”).

¹⁶ 47 C.F.R. §§ 76.503-76.504 (2001).

¹⁷ *Time Warner II* at 9.

¹⁸ *NCCB*, 436 U.S. at 802. This standard, applied by the Supreme Court in 1978 in its review of the Commission action adopting the Newspaper Rule, was also applied by the *Fox Television* and *Sinclair* courts. *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1045-47 (D.C. Cir. 2002) (“*Fox Television*”), *rehearing granted* 293 F.3d 537 (D.C. Cir. 2002); *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 167-68 (D.C. Cir. 2002) (“*Sinclair*”).

within the [Commission's] general rulemaking authority.”¹⁹ The Newspaper Rule is an unreasonable means to attempt to achieve viewpoint diversity because the Commission's ‘predictive judgment’ on which the *NCCB* court relied²⁰ has been proven wrong. The lack of evidence put forth by the Commission in 1975 to justify its imposition of a sweeping ban on a class of potential broadcasters will not suffice today. The Supreme Court said the Commission must do more than “simply ‘posit the existence of the disease sought to be cured.’ . . . It [must] draw “reasonable inferences based on substantial evidence.”²¹ The evidence shows that newspaper-broadcast combinations provide more and better news and public affairs programming, without any harm to diversity.

III. The Newspaper Rule is not “necessary in the public interest.”

In the intervening years since 1975, Congress created an explicit presumption in favor of deregulation that directs the Commission to repeal ownership rules in the absence of evidence to the contrary. In 1996, Congress directed the Commission to review its ownership rules every two years and to “repeal or modify any regulation it determines to be no longer in the public interest.”²² In two appellate decisions, the Court of Appeals for the District of Columbia Circuit has either vacated or remanded ownership rules because the Commission has failed to overcome the deregulatory presumption in this Biennial Review Standard.²³

¹⁹ *NCCB*, 436 U.S. at 796 (emphasis added).

²⁰ *See id.*

²¹ *See Time Warner II* at 1133, citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664 and 666 (1994) (“*Turner I*”), quoting *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1985); *see also Susan M. Bechtel v. FCC*, 10 F.3d 875, 880 (D.C. Cir. 1993) (“There comes a time when reliance on unverified predictions begins to look a bit threadbare.”).

²² Telecommunications Act of 1996, § 202(h).

²³ *Fox Television and Sinclair* *supra* at n.19.

In *Fox Television*, the court stated the Biennial Review Standard “carries with it a presumption in favor of repealing or modifying the ownership rules.”²⁴ Chairman Powell commented that the D.C. Circuit’s decision in *Fox Television* “compels the Commission” to “repeal these regulations unless the Commission makes an affirmative finding that the rules are necessary to serve the public interest.”²⁵ This point was underscored in *Sinclair* when the court rejected the Commission’s attempt to justify retention of the local television rule²⁶ in the absence of “definitive empirical studies quantifying” local media substitutability.²⁷ In remanding the rule, the court said, “This ‘wait-and-see approach, however, cannot be squared with [the] statutory mandate . . . to ‘repeal or modify’ any rule that is not ‘necessary in the public interest.’”²⁸

The reasonableness of the Commission’s action to retain or reformulate the Newspaper Rule will be subject to stringent review under the Biennial Review Standard. For example, the *Fox Television* court said that the Commission’s diversity rationale for retaining the cable-broadcast rule²⁹ was “woefully inadequate” because it failed to reconcile its relaxation of the duopoly rule with retention of the cross-ownership rule.³⁰ The Newspaper Rule is directly

²⁴ *Fox Television*, 280 F.3d at 1048.

²⁵ Testimony of Chairman Michael K. Powell before the Subcommittee on Commerce, Justice, State, and the Judiciary of the Committee on Appropriations, United States Senate, March 7, 2002.

²⁶ 47 C.F.R. 73.3555(b)(2001).

²⁷ *Sinclair* 284 F.3d at 164. Judge Sentelle would have vacated the rule because he interprets the Biennial Review Standard to require repeal once the court determined the Commission failed to justify the rule as necessary. *Id.* at 170-71.

²⁸ *Id.* at 164.

²⁹ 47 C.F.R. 73.3555(e)

³⁰ *Fox Television*, 280 F.3d at 1052. Anticipating the court’s concern, in his separate statement in the 1998 Biennial Review Report, Commissioner Powell said, “we allow a single entity to own two broadcast stations in many markets, if enough ‘voices’ remain in the market. I do not see why newspaper/broadcast combinations could not be regulated the same way.” 1998 Biennial Review Report at 11157.

analogous to the cable-broadcast cross-ownership rule in that they are both intended to promote diversity of voices by banning common ownership of two types of media in a local market.³¹

The evidentiary standard that must be met in order to overcome the Biennial Review Standard presumption for repeal is high. The court in *Fox Television* found that the Commission had not shown “a substantial enough probability” that a combined broadcast station-cable operator would discriminate against other broadcast stations in the local market “to deem reasonable a prophylactic rule as broad as the cross-ownership ban.”³² In order to show that the Newspaper Rule is necessary to promote viewpoint diversity, *the Commission must be able to show that commonly owned newspaper and broadcast combinations are harmful to viewpoint diversity*. The record does not support this factual prerequisite; instead, the facts show that the rule harms viewpoint diversity.

The record compiled in prior Commission dockets involving the Newspaper Rule³³ and the additional Media Task Force Studies released in October 2002 do not provide any evidence, let alone substantial evidence, for the Commission to conclude that diversity is harmed by a commonly-owned newspaper and broadcast station in a local market. Studies in the record do not find a pattern of editorial bias or slant in the content of commonly-owned local newspapers and broadcast stations. The study of news coverage preceding the 2000 Presidential Election in ten newspaper-broadcast combinations concludes that “common ownership of a

³¹ *NCCB* at 436 U.S. at 786; *Fox Television*, 280 F.3d at 1051-52.

³² *Id.* at 1051.

³³ *Cross-Ownership of Broadcast Stations and Newspapers; Newspaper/Radio Cross-Ownership Waiver Policy*, 16 FCC Rcd 17283 (2001) (“*Newspaper-Broadcast NPRM*”); *1998 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 15 FCC Rcd 110588 (2000); *Newspaper/Radio Cross-Ownership Waiver Policy*, 11 FCC Rcd 13003 (1996)

newspaper and a television station in a community does not result in a predictable pattern of news coverage and commentary about important political events in commonly owned outlets.”³⁴

Instead, the Newspaper Rule harms the public by denying access to superior quality news and information. Even in 1975, the Commission acknowledged that local newspaper-broadcast combinations provided more and better news and public affairs programming.³⁵ Fresh evidence demonstrates that local newspaper-broadcast combinations provide more news and public affairs programming, receive two and three times the average number of awards when compared to other broadcast stations, and serve their audiences with more and better news and public affairs programming.³⁶ By denying readers and viewers access to news and public affairs programming produced by companies that have consistently outperformed other news sources, the public is harmed.

Dispatch’s service to the public in Columbus and throughout Ohio exemplifies the superior performance of newspaper-broadcast combinations documented in the research. Because of the combined journalistic resources of *The Columbus Dispatch* and WBNS television and radio, Dispatch has been able to operate a regional cable news network, the Ohio News Network (ONN). ONN is distributed on cable systems serving over 1.3 million homes in Ohio,

³⁴ D. Pritchard, Viewpoint Diversity in Cross-Owned Newspapers and Television Stations: A Study of News Coverage of the 2000 Presidential Campaign, September 2002 (FCC Media Ownership Working Group Research Paper #2). (“[W]e found no generalized evidence of ownership manipulation of the news.”)

³⁵ *NCCB*, 436 U.S. at 807. (The Commission’s “own study of existing co-located newspaper-television combinations showed that in terms of percentage of time devoted to several categories of local programming, these stations had displayed ‘an undramatic but nonetheless statistically significant superiority’ over other television stations.”)

³⁶ Spavins, Thomas, et al. The Measurement of Local Television News and Public Affairs Programs, September 2002 (FCC Media Ownership Working Group Research Paper #7)

providing in-depth Ohio state government coverage along with other news, features, and sports to people throughout the state. Among its accomplishments are the following:

- ONN airs “Capitol Square” a statewide weekly political and issue program. The program features Ohio political figures as guests and a panel of print and radio journalists.
- ONN has won seven Associated Press awards including two awards for election coverage in 2000 and 2001, Best Continuing Coverage for the Jay D. Scott Execution, and three awards for its sports coverage. ONN was also recognized for “Best Documentary” for “John Glenn: Through Space and Time.”
- ONN has won four First Place awards from the Ohio Society of Professional Journalists; three first place Cleveland Press Club Awards; and has four Emmy Nominations for News in 2002.

In addition, Dispatch’s newspaper, radio and television resources provide readers and viewers with top quality news and information:

- *The Columbus Dispatch* reporters based in Washington, DC provide the broadcast stations and ONN with debriefing and other news material for additional depth and factual integrity, particularly on issues of interest to Ohioans.
- ONN, WBNS and WTHR staff and manage a two-person television news bureau in Washington, DC producing local news content for each operation. ONN broadcasts “On the Hill” a regularly-scheduled half-hour interview program with a member of Congress, produced by the Washington Bureau. *The Columbus Dispatch* reporters and broadcast reporters host the show on alternate weeks.

On a daily basis, people throughout Ohio have access to a wider and more diverse range of news and information than they would have without the combined resources of Dispatch. The commitment to news is, and has always been, a hallmark of this company. It is not surprising that the empirical studies done by the Media Ownership Working Group confirm what Ohioans already know: that newspaper-broadcast combinations provide more news, better quality coverage, and a wider range of public affairs programming.

IV. Attempts to Reformulate or Modify the Newspaper Rule are Futile.

If the Commission attempts to take action short of repealing the Newspaper Rule, it will face an even harder evidentiary task of deciding where to draw a line. There is no evidence in the record previously made on the Newspaper Rule or in the Media Ownership Working Group studies to support, for example, a rule that applies only to newspapers and television or to newspapers and television only in smaller markets.

This evidentiary problem will make it unrealistic for the Commission to adopt a unified ownership rule. The data will not help the Commission decide that an entity should be able to own any particular number of newspapers and broadcast operations in a particular market because it is simply not quantifiable to the level of refinement that the court will require based on the *Fox Television* and *Sinclair* decisions. The reviewing court will surely look for justification that it is “necessary in the public interest” to include newspapers in any reformulated cross-ownership rule, justification that is not evident from the previous record or new studies.

Dispatch also believes that the level of competition in the media today is more than adequate to ensure that multiple, diverse, and antagonistic points of view are accessible by readers and viewers throughout the United States. For example, the study by the Commission’s Office of Plans and Policy finds “an increasingly competitive environment for television broadcasting. . .continuing audience fragmentation and further pressure on broadcast advertising revenues” due the emergence and growth of the cable and satellite industries.³⁷ As Chairman Powell pointed out, “Different owners may have different perspectives, but they probably have more in common as commercial interests than not, for each must compete for maximum

³⁷ See Levy, Jonathan, et. al., *Broadcast Television: Survivor in a Sea of Competition*, September 2002 (FCC Media Ownership Working Group Research Paper #12).

audience share to remain profitable. . . Controversy and conflict are the stuff of good story. If different viewpoints are to be found, I think they will be the products of the commercial market much more than by our rules and our adherence to the high-brow ideal we used to defend them.”³⁸

In conclusion, since 1975 there has been no evidence that local newspaper-broadcast combinations harm viewpoint diversity and, indeed, the continued proscription on these combinations has harmed the public by impeding newsgathering synergies that would improve the scope and quality of local coverage. The Commission should recognize the benefits that would flow to the public from prompt repeal of the Newspaper Rule. For all of the reasons described above, Dispatch requests this Commission immediately repeal the Newspaper Rule.

Respectfully submitted,

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³⁸ *1998 Biennial Review Order*, 15 FCC Rcd at 11149-50. In June 2002, the Chairman of the House Commerce Committee, Honorable Billy Tauzin, and Chairman of the House Subcommittee on Telecommunications, Honorable Fred Upton, wrote to Chairman Powell expressing their disappointment with the Commission’s decision to defer “what should be an immediate repeal of this outdated rule.” *Television Digest*, July 1, 2002.